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Supreme Court, U.S.
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No. 87-___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

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DEMENNO/KERDOON,

Petitioner,

v.

THE UNITED STATES,

Respondent.

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On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Federal Circuit

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# PETITION FOR CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

1. Whether the Claims Court's Tucker Act jurisdiction over contract actions against the United States is impliedly repealed by the Emergency Petroleum Allocation Act of 1973 ("EPAA") when:

(a) the actions do not arise under the EPAA itself, but rather are founded upon contracts in which the United States agreed to be bound by EPAA price limits on sales of crude oil;

(b) the "implied repeal" theory rests on the United States' inconsistent contentions (i) that for purposes of EPAA actions in the district courts, it has not waived sovereign immunity, but (ii) that for purposes of contract actions in the Claims Court, claims founded upon contracts in which it agreed to abide by

EPAA price limits "arise under" the EPAA, and (iii) that since EPAA claims may be brought only in the district courts the EPAA impliedly repeals Tucker Act jurisdiction; and

(c) adopting these inconsistent United States' positions (separately approved by different courts of appeals) leaves private parties who contracted with the United States without remedy for its breach of express contractual covenants.

Rule 21.1 Listing. This petition seeks review of a judgment of the United States Court of Appeals for the Federal Circuit that was entered in two consolidated cases: Tipperary Refining Co. v. United States, No. 87-1233, and DeMenno/Kerdoon v. United States, No. 87-1234. There were no other parties in these consolidated proceedings below. Counsel for Petitioner DeMenno/Kerdoon is presently informed that Tipperary Refining Company will file a petition for certiorari seeking review of the judgment in No. 87-1233.

Rule 28.1 Listing. DeMenno/Kerdoon is a California corporation that has no parent company or subsidiaries. It has two corporate affiliates: Ashbury Oil Co., Inc. and D/K Properties.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

Petitioner DeMenno/Kerdoon respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") entered in DeMenno/Kerdoon, Plaintiff-Appellant v. The United States, Defendant-Appellee, No. 87-1234.

## OPINIONS BELOW

The opinion of the Federal Circuit, reported at 833 F.2d 301, is set forth in the separately bound Appendix to this Petition ("App.") at A1. The opinion of the Claims Court, reported at 11 Cl. Ct. 572, is set forth in App. at A3.

## JURISDICTION

The judgment of the Federal Circuit was entered on November 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

## STATUTES INVOLVED

1. The Tucker Act, 28 U.S.C. § 1491(a)(1) (1982), which provides in pertinent part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Con-

> situation, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

2. Sections 23(a)(6) and 27(b),(e) of The Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1349(a)(6), 1353(b), (e) (1982), the pertinent texts of which are set forth in App. at A32 et seq.

3. Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1) (1982), the text of which is set forth in App. at A35.

4. Sections 210 and 211(a) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 742, 748-50 (1971), the texts of which are set forth in App. at A36 et seq.

## STATEMENT OF THE CASE

DeMenno/Kerdoon brought this contract action against the United States in the Claims Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), alleging inter alia that the United States had breached two contracts in which it agreed to sell royalty in-kind oil to DeMenno/Kerdoon.

One of the contracts was for sale of oil from the Outer Continental Shelf (the "Offshore Contract"), and was entered pursuant to The Outer Continental Shelf Lands Act, as amended, 43 U.S.C. §§ 1331 et seq. (1982) ("OCSLA"). OCSLA authorizes the Secretary of Interior to grant mineral leases of the seabed and subsoil of the Outer Continental Shelf under the jurisdiction and control of the United States, and to retain a royalty interest in the extracted minerals. 43 U.S.C. § 1337. OCSLA and regulations promul-

gated thereunder also permit the Secretary to take that royalty interest in kind and sell the resulting crude oil to small refiners such as DeMenno/Kerdoon.

Before the parties entered the Offshore Contract, the Congress -- in response to widespread complaints that the Department of Interior ("DOI") was refusing to comply with the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 et seq. (1982) ("EPAA"), and Department of Energy regulations thereunder -- amended OCSLA in 1978 to impose price restrictions on DOI's authority to sell royalty crude oil to small refiners. The 1978 OCSLA amendments required that DOI could sell such crude oil "for not more than its regulated price". 43 U.S.C. § 1353(b)(1). The 1978 amendments also defined the term "regulated price" as "the highest price . . . at which oil

[may] be sold pursuant to the Emergency Petroleum Allocation Act of 1973 . . . and any rule or order issued under such Act." 43 U.S.C. § 1353(e)(1)(A). Congress further required that DOI could sell or otherwise dispose of such royalty crude oil only "in accordance with any provision of law, or regulations issued in accordance with such provisions, which provide for the Secretary of Energy to allocate, transfer, exchange or sell oil in amounts or at prices determined by such provisions of law or regulations." 43 U.S.C. § 1353(b)(3).

On June 3, 1980 -- after the effective date of the 1978 OCSLA amendments -- the parties entered the Offshore Contract, in which the United States agreed to sell to DeMenno/Kerdoon royalty crude oil produced from the Outer Continental Shelf. Article V of the Offshore Contract pro-

vides, inter alia, that the United States "agrees to accept" and DeMenno/Kerdoon "agrees to pay for said royalty oil at the regulated price," and that "[t]he term 'regulated price' means the highest price . . . at which oil may be sold pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751 et seq., and any rule or order issued under such Act".

The other contract between the parties was for the sale of oil from lands owned by the United States (the "Onshore Contract"), and was entered pursuant to the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181 et seq. (1982) (the "Mineral Act"). The Mineral Act, which regulates disposition of crude oil taken from lands owned by the United States, authorizes the Secretary of the Interior to sell royalty crude oil taken in kind

by the United States. It also permits the Secretary to grant preferences in the sale of such royalty oil to small refiners such as DeMenno/Kerdoon who do not have their own sources of supply of crude oil. 30 U.S.C. § 192.

On June 1, 1980, the parties entered the Onshore Contract, in which the United States agreed to sell to DeMenno/Kerdoon royalty in-kind oil produced from specified government lands. Article XIV of the Onshore Contract provides that the agreement is "subject to all . . . emergency laws of Congress now or hereafter enacted and to all valid orders, rules, and regulations now or hereafter issued pursuant to such laws".

DeMenno/Kerdoon's complaint in this action alleges the United States breached the price limitation provisions of the

Offshore and Onshore Contracts and, with respect to the Offshore Contract, violated the 1978 OCSLA amendments. The complaint was filed in the Claims Court pursuant to the Tucker Act, which provides that the Claims Court "shall have jurisdiction to render judgment upon any claim against the United States founded either upon . . . any Act of Congress . . . or any express or implied contract". 28 U.S.C. § 1491(a)(1).

The United States moved to dismiss the complaint for, inter alia, lack of jurisdiction, on the theory that:

(a) Section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1), incorporates § 211(a) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 743, 748-50 (1971) ("ESA"), which in turn provides that "[t]he district courts of the United

States shall have exclusive original jurisdiction of cases or controversies arising under this title, or regulations or orders issued thereunder";

(b) Proof of the breaches of contracts and OCSLA violations alleged would require proof that the United States sold oil in excess of the maximum prices set by the EPAA and regulations thereunder;

(c) This action therefore "arises under" the EPAA (even though no claim under the EPAA is alleged); and

(d) Section 5(a)(1) of the EPAA therefore impliedly repeals the Claims Court's Tucker Act jurisdiction over contract actions alleging that the United States breached contracts in which it agreed be bound by EPAA price limits.

The Claims Court adopted the United States' jurisdictional theory and granted the motion to dismiss. Although the court stated that the complaint was "drafted specifically to invoke the elements of this court's Tucker Act jurisdiction" and did not allege any claim for violation of the EPAA, it reasoned that the "statutes and regulations involved in the alleged breach of those contracts during the regulated period are the ESA, the EPAA, and . . . pricing regulations thereunder"; that "the core of each of the claims under the Tucker Act . . . during the period of regulation is a violation of [these] pricing regulations"; and that "[these] statutory claims dominate the Tucker Act issues." App. at A17-A19. While acknowledging that "the Tucker Act is not specifically restricted in ESA § 211(a) or mentioned in its legislative history," the Claims Court

thought the "former statute cannot be reconciled with the later enacted statute", that "the two are not capable of co-existence", and that § 211(a)'s "grant of 'exclusive' jurisdiction to one court necessarily means the withdrawal of jurisdiction from all other courts, including [the Claims C]ourt." App. at A23-A24. The Federal Circuit affirmed on the basis of the Claims Court's opinion. App. at A2.[1]

Though the United States advanced here a jurisdictional theory based on "implied repeal" of the Tucker Act because district courts have exclusive jurisdiction over actions "arising under" the EPAA, it

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[1]EPAA price controls on oil were removed on January 28, 1981. So far as the complaint alleged breach of contract claims after that time, the Claims Court dismissed for failure to exhaust administrative remedies. App. at A25-A28. DeMenno/Kerdoon is not seeking review of that portion of the decision below.

has contended elsewhere that no EPAA actions may be brought against the United States in the district courts because the EPAA does not waive its "sovereign immunity." As the Claims Court acknowledged, the latter position has been upheld by the Temporary Emergency Court of Appeals ("TECA"), which (under § 211(b) of the ESA, also incorporated by § 5(a)(1) of the EPAA) has exclusive jurisdiction over appeals in actions "arising under" those statutes. Lunday-Thagard Co. v. Department of Interior, 773 F.2d 322 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1055 (1986), discussed in App. at A15-A16.[2] Thus, the consequence of the decision below (adopting the United

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[2]Lunday-Thagard was later reaffirmed in Transamerican Natural Gas Corp. v. Dept. of Interior, 816 F.2d 689 (Temp. Emer. Ct. App.), cert. denied, 98 L. Ed. 2d 150 (1987), citing, inter alia, the Claims Court's decision in this case. See 816 F.2d at 692-93.

States' theory here that the EPAA "impliedly repeals" the Claims Court's Tucker Act jurisdiction because claims "arising under" EPAA may only be brought in the district courts), coupled with the TECA decision in Lunday-Thagard (adopting the United States' theory there that actions "arising under" EPAA may not be brought against it in the district courts because it has not waived sovereign immunity), is that there is no remedy against the United States in any court for breach of a contract in which it agreed to be bound by EPAA price limits.

## REASONS FOR GRANTING THE WRIT

The ultimate issue is whether Congress intended to repeal the Tucker Act and leave the United States free to violate not only Federal statutes but also contracts in which it expressly agreed to abide by price limits established by

those statutes, thus withdrawing from private parties their century-old statutory right to sue and obtain damages from the United States for breaches of contractual obligations it voluntarily undertakes. In effect, the decision below holds that whenever the United States voluntarily agrees in a contract to take actions that may also be required by a Federal statute, the contractual promise is meaningless and there is no Tucker Act claim for its breach unless the other statute itself independently creates a separate right of action against the United States apart from the contract.

This result stands the Tucker Act on its head, introducing a novel doctrine that will have a substantial and erroneous impact on Federal jurisprudence governing claims against the United States going far beyond the particular statutes

and private party involved in this case.

To reach that result, the courts below contravened this Court's precedents that repeal of the Tucker Act's jurisdiction and remedies is not to be "implied" from later enacted statutes and instead requires a clear and express indication of Congressional intention to do so. Those courts also contravened this Court's precedents governing the meaning of the term "arising under" in Federal jurisdictional statutes. Finally, those courts ignored the express statutory terms of OCSLA and rendered nugatory the central purpose of the 1978 OCSLA amendments.

Given the major significance of the erroneous jurisdictional principles applied below for the law governing claims against the United States, these issues are worthy of this Court's review. This

is particularly so because the Federal Circuit has exclusive jurisdiction over appeals in Tucker Act actions, 28 U.S.C. § 1295(a)(2), meaning that its errors in construing that Act and applicable Federal jurisdictional principles can only be corrected here.

## I. The Decision Below Contravenes This Court's Precedents By Finding An Implied Repeal Of The Tucker Act In The Absence Of Any Clear Or Express Congressional Intention To Do So.

The complaint in this case alleges claims for breach of the United States' contracts and for violation of OCSLA. The Tucker Act provides "the consent of the United States to be sued eo nomine for the classes of claims described in the Act." United States v. Mitchell, 463 U.S. 206, 215 (1983). As this Court stated in Mitchell, "[t]he Court of Claims' jurisdiction over contract claims against the Government has long been re-

cognized, and Government liability in contract is viewed as perhaps 'the widest and most unequivocal waiver of federal immunity from suit.'" 463 U.S. at 215 (citation omitted). In addition:

> [T]here is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a claim falls within this category, the existence of a waiver of sovereign immunity is clear.

Id. at 218.

This Court has repeatedly held that repeal of Tucker Act jurisdiction and remedies will not be implied from later enacted statutes, nor found to exist in the absence of clear congressional intent to do so. The Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), are illustrative. There, no such implied Tucker Act repeal was found with respect

to Fifth Amendment "taking" claims arising out of a plan of reorganization under the Regional Rail Reorganization Act of 1973, even though that Act created a "Special Court" and provided for "the consolidation before [that court] of 'all judicial proceedings with respect to the final [reorganization] plan.'" 419 U.S. at 127 (citations omitted). Because this Court could find no unambiguous legislative history to support "the argument that the Rail Act should be construed to withdraw the Tucker Act remedy," it held that "applicable canons of statutory construction require[d]" the opposite result:

> [R]epeals by implication are disfavored. Rather, since the Tucker Act and the Rail Act are "capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Moreover, the Rail Act is the later of the two statutes and we agree with the Special Court:
>
> > "A new statute will not be read as wholly or even partially

> amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled . . .. This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute, here the broadly based jurisdiction of the Court of Claims. Before holding that the result of that earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it made a considered determination to that end . . .."

Id. at 133-34 (emphasis added; citations omitted).

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), applied the same principles in holding that the statutory procedure under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") did not repeal Tucker Act jurisdiction over a "taking" claim arising from the operation of FIFRA:

> In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a [later enacted] federal statute, the proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but "whether Congress has in the [statute] withdrawn the Tucker Act grant of jurisdiction to the Court of Claims . . . ."
>
> . . . Since the Tucker Act grants what is now the Claims Court "jurisdiction to render judgment upon any claim against the United States founded . . . upon the Consituation," we would have to infer a withdrawal of jurisdiction with respect to takings under FIFRA from the structure of the statute or from its legislative history. A withdrawal of jurisdiction would amount to a partial repeal of the Tucker Act. This Court has recognized, however, that "repeals by implication are disfavored."
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> * * *
>
> Congress in FIFRA did not address the liability of the government to pay just compensation should a taking occur. . . . [T]he failure cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy.

467 U.S. at 1017-18, 1018-19 (emphasis added by Court; citations omitted). Ac-

cord, e.g., Hatzlachh Supply Co., Inc. v. United States, 444 U.S. 460, 462-66 (1980) (per curiam) (Federal Tort Claims Act's express exclusion of claims arising from "detention of goods" did not impliedly repeal Tucker Act remedy for breach of implied bailment contract). Cf. Block v. Neal, 460 U.S. 289, 298 (1983) (Federal Tort Claims Act's express exclusion of Government liability for misrepresentation would not bar negligence claim raising "common factual and legal questions").

The decision below contravenes the important jurisdictional principles governing claims against the United States established by these precedents. Nothing in the EPAA (or the ESA, which it incorporates by reference) expressly withdraws Tucker Act jurisdiction over actions against the United States for breach of contract or violations of another Federal

statute. The Claims Court itself acknowledged that "the Tucker Act is not specifically restricted in ESA § 211(a) or mentioned in the legislative history." App. at A23.

Nonetheless, the Claims Court found an implied repeal of the Tucker Act, holding it "could not be reconciled" with the later enacted ESA and EPAA, with which it was "not capable of co-existence". App. at A23. Notwithstanding that the complaint was "drafted specifically to invoke the elements of this court's Tucker Act jurisdiction" and alleged no claim for violation of the EPAA, the court reasoned that DeMenno/Kerdoon's action was one "arising under" the EPAA because the EPAA issues involved in the United States' breach of its contracts and OCSLA violations "dominate the Tucker Act issues." App. at A17, A19. The court then

reasoned that since § 211(a) of the ESA gives "exclusive jurisdiction" to the district court in cases "arising under" the EPAA, this "necessarily means withdrawal of jurisdiction from all other courts, including this court. The two jurisdictions cannot exist together." App. at A24.

In adopting this chain of reasoning, the Claims Court looked not to precedents of this Court, but rather to decisions of the former Court of Claims by which it considered itself bound. App. at A20-A21. The Court of Claims decisions are in fact inapposite; and more important, the Claims Court's reasoning flouts the settled principles established by this Court in the decisions reviewed above.[3]

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[3]The cases the Claims Court purported to follow are The Poole & Kent Co. v. United States, 566 F.2d 1189 (Ct. Cl. 1977), and Metsch v. United States, 493

Giving the district courts "exclusive jurisdiction" of cases "arising under" the EPAA does not demonstrate a "clearly expressed congressional intention" to repeal the Claims Court's Tucker Act jurisdiction over actions for breach of contract and violation of OCSLA, even if price limits set by the EPAA and regulations thereunder may form some of the elements of the breach of contract and OCSLA claims. This Court has consistently refused to find implied repeal of the Tucker Act in cases presenting stronger arguments of "identical actions" and "conflicting jurisdiction" than any the United States can advance here.

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F.2d 1232 (Ct. Cl. 1974). In fact, both cases presented challenges to the validity of administrative orders issued under the ESA and thus fell squarely within the terms of ESA § 211. Also, the plaintiffs in those cases did have remedies in the district courts; and neither case considered this Court's precedents on "implied repeal" of Tucker Act remedies.

For example, Hatzlachh Supply Co., Inc. v. United States held per curiam that the Federal Tort Claims Act's express exclusion of Government tort liability for claims arising from the detention of goods does not repeal the Tucker Act remedy for breach of an implied bailment contract arising out of the same transaction or occurrence. 444 U.S. at 462-65. In the Regional Rail Reorganization Act Cases, this Court found no conflict between the jurisdiction of the Rail Act's "Special Court" over "'all judicial proceedings' with respect to" the Act's reorganization plan and the jurisdiction of the Claims Court over a "taking" claim arising out of that plan, and held that the Rail Act and Tucker Act were "'capable of co-existence.'" 419 U.S. at 127, 133-34 (emphasis added).

In this case, DeMenno/Kerdoon's breach

of contract and OCSLA actions are no more "identical" to an action "arising under" the EPAA than the bailment action permitted in Hatzlachh was "identical" to the tort claim excluded under the Federal Tort Claims Act. Likewise, the Claims Court's Tucker Act jurisdiction can "co-exist" with the district courts' EPAA jurisdiction in this case as easily as it "co-existed" with the Rail Act "Special Court" jurisdiction in the Regional Rail Reorganization Cases. Contrary to the Claims Court's reasoning, the "two jurisdictions" here are plainly "capable of co-existence": Tucker Act actions "founded upon" breach of contract and OCSLA violations can be entertained in the Claims Court, while actions alleging claims (and therefore "arising") under the EPAA can be entertained in the district court under § 211(a) of the ESA. Since no "'clearly expressed congression-

al intention to the contrary'" is anywhere to be found, "'it is the duty of the courts . . . to regard each [statute] as effective." Ruckelshaus v. Monsanto Co., 467 U.S. at 1018, quoting Regional Rail Reorganization Cases, 419 U.S. at 133-34.

Indeed, in United States v. Palmer, 128 U.S. 262 (1888), this Court directly rejected Government objections to Tucker Act jurisdiction remarkably similar to those upheld here by the courts below. Palmer involved an action against the United States in the Court of Claims alleging breach of an implied contract for use of plaintiff's patent. At that time, there was no statutory basis to sue the United States for tortious patent infringement, and the Circuit Court had exclusive jurisdiction over patent infringement actions. This Court first

rejected the Government's contention that the substance of plaintiff's complaint was an inactionable claim for tortious infringement: "This is not a claim for an infringement, but a claim for compensation for an unauthorized use, -- two things totally distinct in the law". 128 U.S. at 269. The Court then rejected the Government's "object[ion] that an action cannot be brought in the Court of Claims on a patent, the Circuit Court having exclusive jurisdiction of this subject": "[W]hilst that objection may be available as to actions for infringement of a patent, . . . it is not valid as against actions founded on contracts for the use of patented inventions." Id. See also United States v. Berdan Fire-Arms Mfg. Co., 156 U.S. 552, 566-67 (1895).

The Claims Court's contrary reasoning here -- that the grant of EPAA jurisdic-

tion to the district courts "impliedly repeals" its own jurisdiction under the Tucker Act over actions against the United States -- is especially indefensible since the Government has successfully contended elsewhere that no cause of action against the United States arises under the EPAA. In Lunday-Thagard Co. v. Department of Interior, 773 F.2d 32[illegible] (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1055 (1986), TECA upheld the Government's position that the EPAA does not create a cause of action against the United States because it had not waived "sovereign immunity" under that statute. Here, the Claims Court -- which approved and followed Lunday-Thagard, see App. at A15 -- inconsistently held that its Tucker Act jurisdiction over contract and OCSLA actions against the United States has been "impliedly repealed" because the district courts have exclusive

jurisdiction over actions arising under EPAA, even though no action against the United States "arises under" EPAA in the first place.

This holding, coupled with the TECA holding in Lunday-Thagard, permits the Government to avoid its contractual obligations by engaging in jurisdictional sleight-of-hand that borders on a "shell game." When the United States is sued for EPAA violations in the district courts, it contends (and TECA agrees) that no action against the United States "arises under" the EPAA and the case must be dismissed for lack of jurisdiction. But when the United States is sued under the Tucker Act for breach of contract and OCSLA violations, it contends (and the Claims Court and Federal Circuit agree) that the action against it does "arise under" the EPAA, and therefore must also

be dismissed because the district courts have exclusive EPAA jurisdiction.

The Government's jurisdictional legerdemain thus creates a "Catch 22" under which the district courts have no EPAA jurisdiction over the United States, but the Claims Court has no Tucker Act jurisdiction over the United States because the action is "really" an EPAA claim over which the district courts have jurisdiction. This game was of course never intended by the Congress. Under the ESA statutory scheme (incorporated under the EPAA), § 210 first creates a cause of action for pricing violations, and § 211(a) then gives the district courts exclusive jurisdiction over "cases or controversies arising under this title". 85 Stat. 743, 748-50 (1971) (emphasis added); App. at A36-A38. If the Government is correct that § 210 does not cre-

ate a cause of action against the United States, then § 211(a)'s jurisdictional provision is by its terms -- and by the Claims Court's (and TECA's) own reasoning -- entirely inapplicable to the Claim's Court's Tucker Act jurisdiction over actions for breach of contract or violations of other statutes.

Nevertheless, the Government's game will continue unless this Court grants certiorari, because TECA and the Federal Circuit, which respectively have exclusive jurisdiction over EPAA and Tucker Act appeals, have each upheld the "half" of the "Catch 22" that is within its appellate province. No court, other than this one, has jurisdiction over both "halves" of the "Catch"; hence, no court, other than this Court, has authority to undo the repudiation of Congressional intent arising from approval by different

courts of appeals of both of the Government's inconsistent positions. For private parties who contracted with the Government, the result is that they are left without a remedy in any court when the United States violates pricing rules that it is obligated to follow -- independent of any statutory command -- under a contract it voluntarily entered. For the Federal judicial system, the result is that lower court holdings that adopt mutually inconsistent positions, having a substantial and erroneous impact on Federal jurisprudence governing claims against the United States, cannot be corrected unless the writ is granted.

Finally, with respect to the Offshore Contract the decision compounds these errors by ignoring entirely the impact of the 1978 OCSLA amendments on any supposed conflict between ESA § 211(a) and the

Tucker Act. As amended, OCSLA requires DOI not to exceed the regulated EPAA price in selling royalty oil to small refiners, 43 U.S.C. § 1353(b),(e), and creates a right of action against the United States for compensation for royalty oil sold above the maximum lawful price, Amoco Production Co. v. Hodel, 815 F.2d 352, 360 (5th Cir. 1987).[4] The 1978 OCSLA amendments also expressly provide (in 43 U.S.C. § 1349(a)(6)) that:

> [N]othing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

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[4]Ironically, in Amoco Production the United States successfully contended that suits against it for violation of the OCSLA had to be brought in Claims Court under the Tucker Act. The 1978 OCSLA amendments provide, inter alia, for a cause of action against the United States to "compel compliance" with the statute. 43 U.S.C. § 1349(a)(1). Such a statutory right of action permits recovery of overcharges made in violation of price control regulations. Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946).

Thus, the OCSLA amendments both (a) confer a statutory right of action for monetary compensation, and (b) preserve the Tucker Act's common law action for breach of contracts entered into pursuant to OCSLA -- both of which actions may be brought in the Claims Court under the express terms of Tucker Act. See 28 U.S.C. § 1491(a)(1). There is no conceivable way that these statutory provisions, enacted by the 1978 OCSLA amendments, could have been "impliedly repealed" by the earlier enactments of the EPAA and ESA.

## II. The Decision Below Also Contravenes Settled Doctrine Governing The Meaning Of The Words "Arising Under" As Used In Federal Jurisdictional Statutes.

DeMenno/Kerdoon's complaint alleges claims for breach of express covenants in contracts between it and the United States, and for direct violation of

OCSLA; it does not allege any claim under the EPAA or ESA. The courts below nevertheless determined that the action was (in the words of ESA § 211) one "arising under" the EPAA and ESA. Although the Claims Court's reasoning on the point is not completely clear, it apparently so held because establishing the alleged contractual breaches and OCSLA violations would require proof that the United States sold oil in excess of the maximum prices set by the EPAA and regulations thereunder. See App. at A17-A19. In so holding, the courts below contravened this Court's precedents governing the meaning of the words "arising under" in Federal jurisdictional statutes.

As this Court has long held, "a suit arises under the law that creates the cause of action." American Well Works Co. v. Layne and Bowler Co., 241 U.S. 257,

260 (1916). In this case, the law that "create[s] the cause of action" is both OCSLA and the common law of contracts under the Tucker Act. See United States v. Mitchell, 463 U.S. at 215-26.[5] As this Court only recently held, for purposes of determining Federal question jurisdiction under 28 U.S.C. § 1331, a case does not "arise under" a given Federal statute merely because establishing a cause of action conferred by some other law will require as an element proof that the Federal statute was violated:

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[5]Because this case involves contract claims, it does not present the issue that led three Justices to dissent in Mitchell -- i.e., whether a statute creates any right to recover monetary damages in the first instance. In Tucker Act contract cases, "[t]he United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against the citizens under the same circumstances will be implied against [the United States]." United States v. Bostwick, 94 U.S. 53, 66 (1876).

> [A] complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. ___, 92 L. Ed. 2d 650, 664 (1986).

Thus, a breach of contract claim does not "arise under" the Federal patent laws (and thus fall within the exclusive jurisdiction of the Federal courts under what is now 28 U.S.C. § 1338(a)), even if the subject matter of the contract is a patent and adjudication of the claim will require interpretation and application of that Federal law. Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255 (1897). See also Phillips Petroleum Co. v. Texas, Inc., 415 U.S. 125 (1974) (Helium Conservation Act and Natural Gas Act); Pan

American Petroleum Corp. v. Superior Court, 366 U.S. 656 (1961) (Natural Gas Act); Moore v. Chesapeake and Ohio Ry., 291 U.S. 205 (1934) (Federal Safety Appliance Act). The contrary rule, as followed by the reasoning of the courts below, would open the Federal courts to breach of contract claims whenever a contract incorporates a provision of Federal law as a matter of the parties' private agreement.

In adopting the "arising under" language used in earlier statutes, Congress "must be considered to have adopted also the construction given by [the Supreme] Court to such language, and made it a part of the enactment." Shapiro v. United States, 335 U.S. 1, 16 (1948), citing Hecht v. Malley, 265 U.S. 144, 153 (1924). Nothing in ESA § 211(a) or its legislative history indicates that Con-

gress intended the term "arising under" to mean something different in that statute from what it has always meant under this Court's decisions. To the contrary, the express terms of ESA § 211(a) rebut any contention that Congress intended to give the district courts "exclusive jurisdiction" over every case that might involve ESA or EPAA price regulations, or an interpretation or application of Federal law thereunder. Section 211(a) provides that "nothing in this subsection . . . affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense . . . raised in any proceeding before such court." 85 Stat. at 748-49 (1971); App. at A38. This provision alone makes it abundantly clear that cases do not necessarily "arise under" the ESA or EPAA simply because a court may be required to resolve issues under those statutes and

regulations thereunder.[6]

The Claims Court reached its contrary and erroneous result despite the fact that DeMenno/Kerdoon's complaint was "drafted specifically to invoke the elements of this court's Tucker Act jurisdiction" and did not allege any claim for violation of the EPAA. App. at A17-A19. The suggestion implicit in the Claims Court's comment -- i.e., that a party to a contract who seeks to remedy its breach by filing a Tucker Act action for breach of contract is engaging in "artful pleading" to avoid EPAA jurisdictional rules

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[6]Similarly, Congress incorporated large portions of the EPAA into the Crude Oil Windfall Profit Tax Act, 26 U.S.C. §§ 4986 et seq. (1982 & Supp. III 1985). But Congress plainly did not intend to give the district courts (and TECA on appeal) "exclusive jurisdiction" over tax controversies under that Act; and the Claims Court thus has jurisdiction to decide EPAA issues in adjudicating windfall profit tax refund disputes.

-- is, to say the least, a novel idea. It also contravenes longstanding Federal jurisdictional law that "'the party who brings a suit is master to decide what law he will rely upon.'" Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1, 22 (1983), quoting The Fair v. Kohler Die & Specialty Co., 282 U.S. 22, 25 (1913).

In fact, it is the result below, not DeMenno/Kerdoon's complaint, that elevates form over substance. The contracts in question, rather than incorporating EPAA price limits by reference, could instead simply have set forth verbatim the identical words found in the relevant statutes and regulations without any citation to or mention of the statutes or regulations themselves. Had they done so, no one could credibly have contended that the words were anything other than

what they seemed -- terms of a contract that, if violated, would give rise to a Tucker Act action for breach of contract.

It is no less incredible to reach a different result, as did the courts below, merely because those contractual terms were simply incorporated by reference to the relevant statutes and regulations rather than set forth verbatim. In so doing, the decision below stood the Tucker Act on its head, holding in effect that whenever the United States voluntarily agrees in a contract to take actions that may also be required by a Federal statute, the contractual promise is meaningless and there is no Tucker Act claim for its breach unless the other statute itself independently creates a separate right of action against the United States apart from the contract.

Finally, the presumption against an aberrant construction of the term "arising under" is even stronger when, as here, the result is to abolish any remedy against the United States both for breach of its contracts and for violations of its obligations under a separate, later statute (the 1978 OCSLA amendments). As this Court has repeatedly said:

> The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.

United States v. Mitchell, 463 U.S. 206, 219 (1983); Block v. Neal, 460 U.S. 289, 298 (1983); United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 383 (1949).

## III. The Decision Below Also Contravenes The Explicit Provisions And Central Purpose Of The 1978 OCSLA Amendments.

The touchstone of the issue decided

below is Congressional intent. The result of that decision (construing claims for OCSLA violations as "arising under" the EPAA), coupled with the TECA's decision in Lunday-Thagard (holding that no cause of action against the Government "arises under" the EPAA), means there is no remedy against the United States in any court for the OCSLA violations alleged in this case. This result necessarily renders nugatory the central purpose of the 1978 OCSLA amendments -- to require the Government to comply with applicable price regulations in selling oil to small refiners during the regulation period.

It is not credible that Congress intended, in enacting the 1978 OCSLA amendments, to engage in an exercise that would be rendered futile by judicial results such as that reached below. "[I]n-

terpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

Obviously, such an "alternative interpretation[] consistent with congressional purpose" is readily "available" here: Cases alleging violation of OCSLA "arise under" that statute, not the EPAA. This "interpretation[]" is particularly obvious since, as noted earlier, the 1978 OCSLA amendments both (a) confer a statutory right of action, and (b) preserve the Tucker Act's common law remedy for breach of contracts entered into pursuant to OCSLA. See pp. 34-36, supra.[7]

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[7]In advancing its jurisdictional theory below, the United States also contended, inter alia, that its violations were "few" and only "technical;" that the

## CONCLUSION

For more than a century and for sound reasons of public policy, Congress has through the Tucker Act made the Government responsible in damages for breaches of its contracts and for violations of statutes that provide for monetary relief. United States v. Mitchell, 463 U.S. at 212-19. In this case, DeMenno/

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Department of Energy might give DOI a "retroactive exemption" from the regulations; and that any recovery in this case would be a "windfall" to DeMenno/Kerdoon. If the United States advances these or similar contentions in opposition to this petition, the following should be noted:

First, such contentions go to the merits of the case, not to the issue of Claims Court jurisdiction. Second, this case has not been tried on the merits and there is no evidence of record to support these contentions. Third, whether or not the violations are accurately characterized as "technical," the Government has asserted claims for billions of dollars against oil companies for such violations of the EPAA. Indeed, the United States is presently asserting claims against DeMenno/Kerdoon for over $179,000,000 on the basis of such "technical" violations.

Kerdoon has brought an action under the Tucker Act to recover its own funds that were unlawfully extracted in violation of express contractual covenants as well as the provisions of OCSLA. There is no fair indication of any Congressional intention, much less one that is is "clear or express," to withdraw that jurisdiction and remedy merely because the alleged contractual breaches or statutory violations also involve the maximum price at which oil may be sold under the EPAA.

To reach that result, the courts below engaged at the Government's urging in what may charitably be termed creative statutory interpretation, an exercise that (1) contravenes settled principles governing purported "implied repeals" of Tucker Act jurisdiction by later enacted statutes; (2) ignores longstanding doctrine on the meaning of "arising under"

in Federal jurisdictional statutes; (3) is internally inconsistent with the Government's position in EPAA cases, adopted by TECA, that no cause of action against the United States "arises under" the EPAA itself; and (4) nullifies the purpose of later enacted legislation.

The petition for certiorari should be granted and the decision below reversed.

Respectfully submitted,

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